

BRIEF OF AUTHORITIES ON BEHALF OF PETITIONER.

The questions involved and raised by this petition are all interlocked with the query:

Has the state the right to move for a rehearing, or assign error, by way of appeal in a criminal case, upon a judgment quashing an indictment?

To ask the question is to answer in the negative.

This question has been before the Supreme Court of the United States and the Supreme Court of Georgia and courts of other jurisdictions many times, and this Court and the Supreme Court of Georgia, have, in an unbroken line of cases, uniformly held that in criminal cases, the State has no right of appeal.

This Court in an exhaustive opinion rendered in the case of: *The United States v. Sanges*, reported in 144 U. S., 310 *et seq.* holds that the Government did not have the right of appeal. In the *Sanges* case, the defendant filed a demurrer to the indictment and the demurrer was sustained by the lower judiciary. The United States excepted and took the case to the Supreme Court of the United States for review and the Court reversed the decision of the lower court and cited many decisions in support of its decision; among the cases cited was a Georgia case, being that of the *State of Georgia v. William Jones*, reported in 7th Georgia—Page 422.

In the *Jones* case, the lower court quashed the indictment, which charged the defendant with the offense of false imprisonment.

A writ of error was sued out to review the decision of the lower court.

A motion was made in the Appellate Court to dismiss the writ of error, on the ground that a writ of error does not

lie at the instance of the State to review a decision in favor of the defendant, and the Supreme Court of Georgia sustained the motion and dismissed the writ of error.

The decision of the highest court of Georgia was written in the year 1849 and has been followed continuously ever since and the ruling as made in the *Jones* case has never been questioned until the judgment by a divided bench now under review was rendered.

In the case at bar, the indictment against defendant, Thompson, was demurred to (R. 12) and his demurrer was overruled (R. 17): Thompson excepted *pendente lite* (R. 17) and upon being convicted, excepted on bill of exceptions, assigning error on exceptions *pendente lite* (R. 1, *et seq.*) and carried his case by writ of error to Court of Appeals of Georgia. The Court of Appeals of Georgia, upon reviewing the writ of error on demurrer, reversed the judgment of the lower court, because the lower court erred in not quashing the indictment (R. 22) and the same court, by a divided bench, upon a motion for rehearing, reversed its former decision.

The majority opinion in the decision under review, holding in the first head note, "upon a proper motion by counsel for the State, a rehearing may be granted, and this Court may reverse its former judgment granting a new trial before the adjournment of the term (R. 32) dissenting opinion (R. 41).

It is respectfully submitted that the statement of the court, concerning the grant of a new trial, in the former judgment is an arbitrary conclusion and is not supported by the record.

The first judgment and the only one, that the court could have had in mind—the judgment rendered January 16, 1942, (R. 22) said nothing about the grant of a new trial.

In this former judgment no new trial was granted—this judgment had no strings tied to it—it was unconditional—

it was absolute and final and said in terse words—"The judgment of the lower court is reversed because the court erred in not quashing the indictment" (R. 22).

The premise of the court being based upon an incorrect statement, it follows that the Court of Appeals of Georgia did not of its own motion vacate the first judgment, because the decision under review expressly says that the decision was rendered not on its own accord, but was at the instance of the State, upon a written motion for rehearing filed by the State (R. 22).

But, be this as it may—the first judgment of the Court of Appeals of Georgia in the case at bar was a final judgment—the Appellate Court quashed the indictment and this was equivalent in law of a verdict of not guilty, and this being true, the court of competent jurisdiction having given the defendant a victory, could not during the same term of court, or any other term, reverse its judgment, even though the acquittal be founded upon misdirection of the judge.

Says Judge Nisbit—in the case of the *State of Georgia v. Jones*—7th Ga. Reports on Page 424, of the volume cited: "If the effect of the judgment is a discharge, there can be no rehearing, either by a new trial or writ of error."

Further, on Page 425 of the same volume, the jurist says:—

"Errors in law cannot be reached by a new trial at the instance of the State." The *Jones* case is cited and approved by the Supreme Court of the United States in the case of *United States v. Sanges*, 144th U. S. 310.

We submit that there can be no technical distinction of difference in the words "rehearing" and in the phrase "writ of error" or "appeal"; they all are words and phrases synonymous, in application, and in common parlance mean the right to be heard over again for the purpose of effecting a change.

But, enough has been said. The decision of the Court

of Appeals of Georgia of date April 3, 1942, sounding in the name of *Clarence J. Thompson v. The State of Georgia*, reported Georgia Appeals,—Page ———; 19 S. E. (2nd Series) Page 777—by a divided Bench: and being the decision now under review—is a solitaire—is out of harmony with the organic law—is in direct conflict with the Constitution of the United States and the State of Georgia in that by this decision, petitioner was deprived of his liberty without due process of law and was twice placed in jeopardy for the same offense.

The decision excepted to is out of tune with established principles of law and procedure, in criminal cases, so old, that the memory of man runneth hardly to the contrary.

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